UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

GULET MOHAMED,

PLAINTIFF,

v.

ERIC H. HOLDER, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES, *ET AL.,*

DEFENDANTS.

Case No. 1:11-CV-00050

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS

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INTRODUCTION

As even Plaintiff has acknowledged, his circumstances have changed since the filing of his original complaint and his motion for preliminary relief. To the extent that he arguably had any cognizable claim for relief from a District Court for his Fourteenth Amendment re-entry claim at the outset of the case when he was still in Kuwait, this case no longer raises any even arguably cognizable controversy regarding alleged denial of re-entry into the United States. Plaintiff returned to the United States from Kuwait on January 20, 2011 and was not denied re-entry. He cannot resurrect that claim by arguing that his Amended Complaint contains a claim for damages against Terrorist Screening Center ("TSC"). In fact, the Complaint does not contain such a damages claim, nor could such a claim succeed, because sovereign immunity precludes damages for alleged constitutional violations against the United States, its agencies, and its officials sued in their official capacities.

Nor can Plaintiff meet the standing requirements for his claims of future injury. Plaintiff's claims regarding a future inability to re-enter the U.S. from abroad are speculative, at best, and do not constitute a certainly impending future injury as required to obtain the type of prospective injunctive relief that he seeks. While he states conclusively that he will again travel and fears that he may be denied boarding, he fails to provide any specificity regarding those plans: that he has plans to leave the United States on a certain date, travel to a certain country or countries, stay there a certain time, or return to the United States on a certain date. Nor does he show that he has investigated and found that the only means of traveling outside the U.S. and returning would be by airplane, thus rendering him unable to re-enter the United States unless he can take a plane directly back to a U.S. port of entry. Nor can he show that even if he had been

on the No Fly List, he would still be on the No Fly List when he next travelled abroad. Indeed, he has not shown that he has even attempted to board an airplane since his return to the U.S. in January 2011. Plaintiff also fails to establish standing to challenge the purported lack of a procedure to challenge his alleged placement on the No Fly List. He cannot claim injury from supposed inability to effectively challenge his alleged No Fly status because he deliberately chose not to utilize the Department of Homeland Security's Traveler Redress Inquiry Program ("DHS TRIP") process made available to him and the opportunity for judicial review in the courts of appeals afforded after a final order from Transportation Security Administration ("TSA"). In other words, Plaintiff cannot claim an "injury" in order to be able to have standing to maintain his case.

But even if Plaintiff were correct that he would in the future be denied boarding an airplane, that action would not impact a fundamental right. There is simply no constitutional right to travel by a specific mode of transportation. Further, the Government may establish rational policies governing international travel, and it is Plaintiff's burden to establish that such policies are wholly irrational. Plaintiff has not even attempted to make that showing in his Complaint or his opposition to Defendants' motion.

Finally, contrary to Plaintiff's claims, filing for redress through DHS TRIP provides the appropriate process for Plaintiff to obtain the ultimate relief he is seeking. Plaintiff, like every other traveler who believes that he or she has been improperly denied boarding because of placement on the No Fly List, is afforded the opportunity to seek redress through this congressionally-mandated program, which is administered by DHS through the TSA. As the declarations submitted by Defendants establish, Plaintiff's attempt to divorce the DHS TRIP

process from TSC actions founders. The redress process includes not just DHS and TSA but also TSC and other agencies in reviewing the petition for redress and any watchlist status. Thus, TSC participates in the DHS TRIP redress process for complaints involving the Terrorist Screening Database ("TSDB"), of which the No Fly List is a subset. The process challenging No Fly status ends when TSA issues a final agency action upon which a complainant can seek review, and that review lies exclusively in the Courts of Appeals under 49 U.S.C. ¶ 46110. It is up to the courts of appeals to determine whether the Plaintiff's alleged placement on the No Fly list was appropriate and further to determine if the redress process is fair and effective. The Court should therefore dismiss this action.

ARGUMENT

I. Plaintiff's Right of Re-entry Claims are Moot Because Plaintiff Resides in the United States and Has Never Been Denied His Right of Re-entry.

Although Plaintiff insists that his case involves the alleged "deprivation of [his] fundamental right to re-enter the United States," Pl's Opp. at 7, the relief he requests, "meaningful notice of the grounds for his [alleged] inclusion on a government watch list," Pl's Opp. at 6, is, in fact, unrelated to this alleged injury. Assuming, *arguendo*, that such an injury had occurred, his claim is now moot, and any relief related to that claim should be denied.

Plaintiff's claim ignores the fact that he has never been denied re-entry into the United States. It is well established that, in general, U.S. citizens who arrive at a U.S. port of entry are permitted to enter the United States after they establish to the satisfaction of a U.S. Customs and Border Protection ("CBP") officer that they are in fact U.S. citizens. 8 C.F.R. § 235.1(b). Notably, lawful entry of U.S. citizens into the United States does not occur until the individual

citizen has presented himself or herself at a U.S. port of entry and been permitted to enter by CBP. *See id*. § 235.1(a) ("Application to lawfully enter the United States shall be made in person to an immigration officer at a U.S. port-of-entry when the port is open for inspection, or as otherwise designated in this section."). On direct flights from Kuwait to Dulles International Airport, the port of entry is Washington Dulles International Airport. *See* Port of Entry-Washington-Dulles http://www.cbp.gov/xp/cgov/toolbox/contacts/ports/dc/5401.xml (last visited 4/8/11). When Plaintiff presented himself at the Port of Entry at Washington Dulles International Airport, he was allowed to enter the United States, and therefore, any claim of denial of re-entry is baseless. *See* Pl's Opp. at 5.

Assuming, however, that Plaintiff could bring a claim that he was denied re-entry, that claim would now be moot. Indeed, the sole support Plaintiff offers as a basis of his alleged denial of re-entry is that he "could not board the plane" in Kuwait. *Id.* at 5. Subsequent to that denial of boarding (a claim that he must pursue through DHS TRIP, *see infra* at 12-15), Plaintiff returned to and currently resides in the United States, Pl's Opp. at 5, thereby making his claim of denial of re-entry moot. *U.S. v. Hardy*, 545 F.3d 280, 283 (4th Cir. 2008) *(*A case is moot if the issues are no longer live and the court is unable to grant effective relief.); s*ee* also *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.,* 528 U.S. 167, 180 (2000) (citing U.S. Const. art. III, § 2).

Plaintiff's response to Defendants' presentation of mootness is to argue that his claim of re-entry cannot be moot because he has a pending claim for damages. Pl's Opp. at 7. Plaintiff, however, does not seek damages in his Complaint. Indeed, the Complaint is styled a "Verified Complaint for Injunctive and Declaratory Relief." Rather, he seeks "attorneys' fees, costs, and expenses". Compl. at 13. Attorneys' fees are not damages, and therefore, cannot insulate

Plaintiff's claim of re-entry from being utterly moot. *See Ferris v. Haymore*, 967 F.2d 946, 954 (4th Cir. 1992); *Hart v. Schering-Plough Corp*., 253 F.3d 272, 273-74 (7th Cir. 2001); *Gardynski-Leschuck v. Ford Motor Co*., 142 F.3d 955, 958-59 (7th Cir. 1998). That the Complaint includes a boilerplate request for "such other relief as the Court may deem just and appropriate" does not change this conclusion. *See Fox v. Board of Trustees of State University of New York*, 42 F.3d 135, 141 (2nd Cir. 1994) (rejecting the argument that a virtually identical boilerplate request constituted a claim for damages).

But even if Plaintiff had requested damages in his Complaint and would otherwise be entitled to damages for an injury, he has failed to identify an applicable waiver of sovereign immunity that would entitle him to such damages against the United States or its officials. While Plaintiff has invoked the Administrative Procedure Act ("APA") as an applicable waiver, *see* Compl. at ¶ 7, that waiver would at most entitle Plaintiff to declaratory and injunctive relief -- not money damages. "The waiver of sovereign immunity in the APA is limited to suits seeking relief 'other than money damages.'" *Randall v. United States*, 95 F.3d 339, 346 (4th Cir. 1996) (quoting 5 U.S.C. § 702). That Plaintiff has also sued Defendants under the Fourteenth Amendment does not create a waiver of sovereign immunity for damages.

Plaintiff has sued the defendants in their official capacity, and as such, this action is against the United States. *Kentucky v. Graham*, 473 U.S. 159, 165 (1985); *Brandon v. Holt*, 469 U.S. 464, 471-72 (1985); *see also Hafer v. Melo*, 502 U.S. 21, 25 (1991) (holding that the real party in interest in an official capacity suit is the governmental entity and not the named official.) Absent a clear and express waiver of sovereign immunity, the Court cannot imply a damages remedy against the United States. *See FDIC v. Meyer,* 510 U.S. 471, 476-80 (1994).

(holding that damages action under *Bivens v. Six Unknown Fed. Agents,* 403 U.S. 388 (1971) cannot lie against a federal agency); *Doe v. Chao,* 306 F.3d 170, 184 (4th Cir. 2002) (observing that "a *Bivens action does not lie against either agencies or officials in their official capacity*") (emphasis in original); *Randall,* 95 F.3d at 345 ("Any remedy under *Bivens* is against federal officials individually, not the federal government.").

Thus, not only was Plaintiff never denied re-entry into the United States, any claim he may be able to bring would have to be moot, as he is currently in the United States. Further, Plaintiff's claim that he seeks damages cannot resurrect an otherwise-moot claim, as he neither requested relief in the form of damages nor identified an applicable waiver of sovereign immunity that would permit such damages to be awarded to Plaintiff in any event.

II. Plaintiff Cannot Demonstrate That He Will Likely Suffer Harm in the Future and Therefore, He Cannot Be Granted Prospective, Injunctive Relief.

Plaintiff does not have standing to seek injunctive relief regarding future travel because he cannot make the requisite showing of imminent, certain future injury. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (requiring "real and immediate threat of repeated injury") (citation omitted); *Scherfen v. DHS*, No. 3:cv-08-1554, 2010 WL 456784, at *13 (M.D. Pa. Feb. 2, 2010) (finding No Fly List claims moot). To obtain prospective relief, Plaintiff must point to "an invasion of a legally protected interest which is . . . "'actual or imminent,' not 'conjectural' or 'hypothetical.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (*quoting Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). Yet Plaintiff continues to rely solely upon the fact that he was unable to board a plane on January 16, 2011, ignoring the fact that he subsequently was able to fly on January 20, 2011 and has not attempted to fly since then and been denied boarding.

His plans for future travel are, at best, pure speculation. Pl's Opp. at 8 (Plaintiff "intends to leave the United States again in the immediate future to visit family and complete a religious pilgrimage.")[1] Plaintiff's allegation that when he "goes abroad again, this situation *may* recur", *id*. at 11 (emphasis added) is precisely the type of allegations that the Supreme Court found too speculative in *Lyon*s to confer standing or to entitle a party to the prospective injunctive relief sought by Plaintiff.

Similar to Plaintiff's allegations, which center on one alleged denial of boarding an airplane, the plaintiff in *Lyons* was subjected to one stop, yet the Court held that he lacked the ability to obtain the injunctive relief sought because he could not show any immediate threat of future harm. In reaching this conclusion, the Court focused on plaintiff's failure to allege facts that he was "realistically threatened by a repetition of his experience of October, 1976" when he was stopped and subjected to a chokehold. 461 U.S. at 109. Here, as in *Lyons*, past experience cannot be the basis for the future injunctive relief Plaintiff seeks. In order to obtain future injunctive relief, Plaintiff would have to show that he would suffer some harm, and any such claim would be entirely speculative. Because Plaintiff has failed to make that showing, he lacks standing to sue for the prospective, injunctive relief he seeks.

[1] It would be beyond the Court's power to order that Plaintiff always be permitted to board flights to the United States or to prescribe the screening and security procedures that should be applied to him, and Plaintiff does not appear to be seeking such future relief. *See, e.g., Blum v. Yaretsky*, 457 U.S. 991, 999 (1982) (a plaintiff "who has been subject to injurious conduct of one kind [does not] possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject.").

III. Plaintiff Has No Fundamental Right to Fly.

In asking this Court to rule on "whether the burden of Defendants' refusal to allow Plaintiff to arrive in the United States via air transportation in the future has the purpose or effect of 'placing a substantial obstacle' in the way of Plaintiff exercising his fundamental right to re-enter the United States." Pl's Opp. at 10 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 877 (1992)),[2] Plaintiff wrongly assumes that U.S. citizens have a fundamental right to travel internationally and return home by plane.

There is no right to international travel, and such travel is "subordinate to national security and foreign policy considerations." *See Haig v. Agee*, 453 U.S. 280, 306-07 (1981). [3] Unlike the right to interstate travel, the freedom to travel internationally is simply an aspect of the liberty protected by the due process clause, and the restrictions on international travel are permissible unless "wholly irrational[.]" *Califano v. Aznavorian*, 439 U.S. 170, 177 (1978). Plaintiff makes no allegation that any of Defendants' watchlist procedures are irrational.

Instead, Plaintiff seems to conflate the "right to enter" the United States with a right to unimpeded international travel to the United States. But even in the context of interstate travel,

[2] Plaintiff's analogies to a citizen's right to family planning or to marriage are simply inapplicable. Pl's Opp. at 10-12. Both of those rights have been afforded heightened scrutiny, which is not the case with Plaintiff's right to fly, which is accorded only rational basis review. *See Califano*, 439 U.S. at 177.

[3] In *Haig v. Agee*, the Supreme Court upheld the revocation of a citizen's passport even though a passport was "the only means by which an American can lawfully leave the country or return to it." 453 U.S. at 293. Agee's activities abroad were deemed to pose a danger to the national security and foreign policy of the United States. The Court upheld this severe restriction on his international travel, explaining that it is "obvious and unarguable that that no governmental interest is more compelling than the security of the Nation." *Id.* at 307 (citation omitted); *see also Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2727 (2010) (referring to "sensitive and weighty interests of national security and foreign affairs"). The Court noted in a footnote that the government had provided temporary papers that would permit Agee to travel back to the United States from his location in Europe, but Agee never returned to the United States. *Haig*, 453 U.S. at 289 n.15. Agee's return was necessarily limited in time by the nature of his temporary papers, subject to the existence of appropriate flights, and could theoretically have been impracticable if other countries would not accept his temporary papers. The Court's conclusion, however, was not influenced by any such considerations. Rather, the Court found that the legitimate national security concerns of the government amply justified the revocation of his passport.

which is recognized as a fundamental right, courts have repeatedly held that there is no right to any particular means of travel, even if the most convenient means of travel is restricted. *See Gilmore v. Gonzales,* 435 F.3d 1125 (9th Cir. 2006) (holding there is no right to air travel even if plaintiff wants to travel to exercise his First Amendment right to petition his government)*; Miller v. Reed,* 176 F.3d 1202 (9th Cir. 1999) (holding there is no right to drive); *Green v. Transp. Sec. Admin*., 351 F. Supp. 2d 1119, 1130 (W.D. Wash. 2005) (holding there is no right to travel "without any impediments" and burdens on a "single" form of transportation are not unreasonable); *see also Town of Southold v. Town of East Hampton*, 477 F.3d 38, 54 (2nd Cir. 2007) ("travelers do not have a constitutional right to the most convenient form of travel") (quotation and citation omitted); *Cramer v. Skinner,* 931 F.2d 1020, 1031 (5th Cir. 1991) (same); *City of Houston v. FAA,* 679 F.2d 1184, 1198 (5th Cir. 1982) (same).

In *Gilmore*, the Ninth Circuit upheld certain requirements for air travel because the plaintiff "does not possess a fundamental right to travel by airplane even though it is the most convenient mode of travel for him." 435 F.3d at 1137. Accepting as true for the purposes of that decision the allegation that "air travel is a necessity and not replaceable by other forms of transportation," the Ninth Circuit nonetheless held that there was no infringement on his constitutional right to domestic travel because other means of travel remained possible, even if the alternative means involved taking a car, train, or bus over 3,000 miles. *Id.* at 1136. Moreover, the Ninth Circuit issued this ruling even though restrictions on interstate travel – unlike international travel may be subject to higher scrutiny. *See, e.g., Fisher v. Reiser*, 610 F.2d 629 (9th Cir. 1979); *see also Califano*, 439 U.S. at 177. If restrictions on a specific means of interstate travel do not trigger or offend the Constitution, this must be even more clearly true

for international travel. It may be less convenient or more expensive to travel by ship, train, or car, but this factor does not impinge on a constitutional right to travel.

It is clear that a citizen's ability to return to the United States is qualified insofar as the Government may, and routinely does, engage in acts that might burden this asserted right. The United States has enacted a variety of laws that might make entering the country more difficult or time-consuming for citizens, all of which have been upheld by the courts. The United States can deny or revoke a passport, *see generally Haig*, 453 U.S. at 280; *Worthy v. Herter*, 270 F.2d 905 (D.C. Cir. 1959); can conduct lengthy and intrusive searches and inspections of anyone attempting to enter the United States, *see e.g.,*19 U.S.C. § 482; 19 U.S.C. § 1582; *U.S. v. Montoya de Hernandez*, 473 U.S. 531 (1985); and impose quarantines, *see, e.g.,* 42 U.S.C. § 264; *U. S. ex rel. Siegel v. Shinnick*, 219 F. Supp. 789, 791 (E.D.N.Y. 1963). The U.S. can even extradite its citizens to face trial and imprisonment in another country, which could permanently prevent the return of a citizen. *See, e.g., Neely v. Henkel,* 180 U.S. 109 (1901); *Vo v. Benov*, 447 F.3d 1235 (9th Cir. 2006). These actions – all of which have been upheld as lawful can delay, complicate or render prohibitively expensive or impossible international travel, including one's return to the United States. As the Supreme Court held in *United States v. Flores-Montano,* "[i]t is axiomatic that the United States, as sovereign, has the inherent authority to protect, and a paramount interest in protecting, its territorial integrity." 541 U.S. 149, 153 (2004).

While Plaintiff may claim that actions of the Kuwaitis limited his options for returning to the United States, anyone who travels abroad always takes the risk that they will be detained or otherwise subjected to foreign law, and they cannot hold the United States responsible for the actions of foreign nations. *See Munaf v. Geren*, 553 U.S. 674, 694-95 (2008) (Constitution does

not prevent US citizens abroad from being subject to foreign law); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 417-18 (1964) ("To permit the validity of the acts of one sovereign state to be [reexamined] and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations.") (internal quotation marks omitted).

IV. Plaintiff's Requested Relief is Available Through DHS TRIP, and Plaintiff Must Bring Any Challenge to DHS TRIP in a Court of Appeals.

In both his Complaint and his Opposition, Plaintiff clearly articulates the relief he seeks: that the Court order the Defendants "to provide Plaintiff with meaningful notice of the grounds for his [alleged] inclusion on a government watch list, and an opportunity to rebut the government's charges and clear his name." Compl. at 13; Pl's Opp. at 4. This is the precise relief DHS TRIP would provide to Plaintiff. And although Plaintiff continues to insist that he does not have to avail himself of DHS TRIP, Pl's Opp. at 13-14, it is DHS TRIP that can provide the relief Plaintiff seeks. Congress has mandated DHS TRIP to be run by TSA and DHS. By refusing to avail himself of DHS TRIP, yet demanding that this Court grant him the identical relief as offered by that process, Plaintiff is asking this Court to replace an administrative procedure with one of Plaintiff's own making. Judicial review of DHS TRIP No Fly List redress determination is available under 49 U.S.C.§ 46110. At that point, Plaintiff can bring a claim challenging the outcome of that administrative process in the Court of Appeals. It will then be up to the Court of Appeals to determine whether the process of DHS TRIP provides sufficient due process regarding Plaintiff's No Fly complaints.

a. Before Bringing a Challenge to His Alleged Placement on the No Fly List, Plaintiff Must Avail Himself of DHS TRIP.

Despite Plaintiff's insistence that he is not challenging the adequacy of DHS TRIP, Pl's Opp. at 14 ("complaint is not directed at the adequacy of the DHS TRIP process"), he seeks from this Court the very relief afforded by DHS TRIP, and as such, his failure to exhaust this readily-available, congressionally-mandated administrative remedy means that his claim is not ripe and judicial review is premature. *See Ostergren v. Cuccinelli*, 615 F.3d 263, 288 (4th Cir. 2010) (quoting *Scott v. Pasadena Unified Sch. Dist.,* 306 F.3d 646, 662 (9th Cir. 2002)) (Ripeness cannot occur when there are "problems such as the inadequacy of the record ... or ambiguity in the record ... will make a case unfit for adjudication on the merits.") (internal quotations omitted).

Plaintiff excuses his failure to avail himself of DHS TRIP by asserting that "DHS lack[s] authority to grant the type of relief requested." Pl's Opp. at 13 (citing *McCarthy v. Madigan*, 303 U.S. 140, 148 (1992)). This allegation, however, is simply incorrect, as DHS, through TSA, is the only agency with authority to grant the relief sought by Plaintiff. In 2004, Congress set up a statutory structure that charged TSA with providing redress to travelers in the very situation Plaintiff claims to be in. *See* 49 U.S.C. § 44903(j)(2)(C)(iii); *Id*. § 44903(j)(2)(G)(i); *Id.* § 44909(c)(6). Specifically, TSA is required to "establish a procedure to enable airline passengers, *who are delayed or prohibited from boarding a flight because the advanced passenger prescreening system determined that they might pose a security threat*, to appeal such determination and correct information contained in the system." 49 U.S.C. § 44903(j)(2)(C)(iii) (emphasis added). Pursuant to this statutory authority, TSA established the Office of

Transportation Security Redress ("OTSR"), which was later designated by the Secretary of Homeland Security as the lead agent managing DHS TRIP.

Plaintiff also implies that because Defendants are involved in redress procedures coordinated by DHS and TSA, Plaintiff can bypass DHS TRIP and ask this Court to order Defendants to offer relief. *See* Pl's Opp. at 12. This argument is incorrect. As explained above, Congress mandated TSA and DHS to provide travelers with a redress process. The fact that TSA and DHS rely upon information and support from TSC does not undermine the control and authority that TSA and DHS have over DHS TRIP. Indeed, the multi-agency collaboration ensures the efficacy of DHS TRIP. *See* Declaration of Christopher Piehota, Deputy Director, Terrorist Screening Center, dkt. 10-3, ¶¶ 26-33.[4] While the Terrorist Screening Center ("TSC") considers whether changes are warranted to an individual's status on the No Fly List, it is TSA that effectuates whether or not individuals may board an airline by determining who may or may not obtain a boarding pass through the administration of passenger prescreening programs. As a result, if an individual is denied boarding due to his placement on the No Fly List, seeks redress, and is removed from the No Fly List, it is TSA that permits the airlines to issue a boarding pass to allow that individual to board a flight. Thus, in order to get the relief he demands, Plaintiff must bring his claims against DHS and TSA after completing DHS TRIP.

[4] Nor would such a rigidly-drawn line make any sense. Inter-agency collaboration is precisely the point of centralizing and sharing the contents of the Terrorist Screening Database and the No Fly and Selectee Lists. Indeed, the lack of this kind of centralized information was specifically cited as a government failing by the 9/11 Commission. *See* 9/11 Comm'n Report, Exec. Summary, at http://govinfo.library.unt.edu/911/report/911Report_Exec.htm ("The missed opportunities to thwart the 9/11 plot were also symptoms of a broader inability to adapt the way government manages problems to the new challenges of the twenty-first century. Action officers should have been able to draw on all available knowledge about al Qaeda in the government. Management should have ensured that information was shared and duties were clearly assigned across agencies, and across the foreign-domestic divide.").

Nor can Plaintiff ask this Court to replace a statutory redress procedure with one of Plaintiff's own creation, merely because he does not want to sue the necessary parties. In accordance with the Congressional mandate described above, TSA and DHS created the DHS TRIP process to do precisely what Plaintiff improperly asks of this Court: to resolve complaints from travelers who believe they have been delayed or prohibited from boarding a commercial aircraft due to being mistaken for, or being a match with, an identity on the Selectee or No-Fly List. A court cannot substitute its judgment for that of Congress in deciding who has the responsibility to provide redress and how they should provide it. *See Brown v. General Servs. Admin.*, 425 U.S. 820, 829, 834-35 (1976) (where Congress created "an exclusive, pre-emptive administrative and judicial scheme for the redress" of injuries, including violations of constitutional rights, Congress' enforcement scheme is presumptively the only means to remedy such injuries).

Plaintiff also argues that even if this Court construes his Complaint to challenge the adequacy of DHS TRIP, he is still not required to avail himself of the process before challenging it in court. For this proposition, Plaintiff relies on two cases, *McCarthy v. Madigan*, 503 U.S. 140 (1992) and *Gibson v. Berryhill*, 411 U.S. 564 (1973). Neither case applies to Plaintiff's claims. In *McCarthy*, the Court held that a prisoner seeking only money damages was not required to exhaust administrative remedies provided by the Bureau of Prisons. 503 U.S. at 149. *Gibson* is similarly inapplicable to Plaintiff's case, holding that state administrative remedies need not be exhausted where there is "some doubt as to whether the agency was empowered to grant effective relief" or if "the administrative body is shown to be biased or has otherwise predetermined the issue before it." *Gibson,* 411 U.S., at 575, n. 14. Here, Plaintiff seeks from

this Court injunctive relief that Congress has instructed TSA to provide to travelers. TSA provides that relief through DHS TRIP. Accordingly, Plaintiff cannot fail to utilize DHS TRIP and then ask this Court to provide the very relief available through the DHS TRIP process. *See, e.g.*, *Madsen v. Boise State Univ.*, 976 F.2d 1219, 1220 (9th Cir. 1992) (noting long-standing principle that "a plaintiff lacks standing to challenge a rule or policy to which he has not submitted himself by actually applying for the desired benefit"); *Shavitz v. City of High Point*, 270 F. Supp. 2d 702, 710 (M.D.N.C 2003) (where "Plaintiff has failed to use the process provided to him, he cannot show that he has suffered injury because of the insufficiency of the process provided").

Were Plaintiff to avail himself of DHS TRIP, he would be able to obtain the remedy he requests in his Complaint – an opportunity to challenge his alleged placement on the No Fly List. If he does not feel that the relief he seeks has been granted, at the completion of that administrative process, Plaintiff could challenge the final TSA order in a Court of Appeals, pursuant to 49 U.S.C. § 46110. Plaintiff has provided no basis to believe that a Court of Appeals could not adjudicate the type of relief Plaintiff seeks in this case.

b. **Plaintiff Cannot Challenge a Final Order from TSA in this Court.**

Even if Plaintiff had availed himself of DHS TRIP, under 49 U.S.C. § 46110, this Court could not hear his claim. Judicial review of such final orders from TSA is available only in the Courts of Appeal. *See Scherfen v. DHS*, No. 3:cv-08-1554, 2010 WL 456784, at *11 (M.D. Pa. Feb. 2, 2010) (holding that DHS TRIP was established pursuant to "a statute encompassed by the jurisdictional grant conferred by § 46110 over security-related orders issued pursuant to statutory authority established in 49 U.S.C. §§ 40101 through 46507."). Plaintiff insists that Section

46110 does not affect his ability to bring a claim in this Court, Pl's Opp. at 15, and he relies on the Ninth Circuit's opinion in *Ibrahim v. DHS*, 538 F.3d 1250 (9th Cir. 2008) for support. Plaintiff's reliance on this decision, however, is misplaced. In *Ibrahim*, the Ninth Circuit held that a challenge to the "policies and procedures implementing the No Fly List" was a challenge to an "order" of TSA and therefore must be brought in a Court of Appeals. 538 F.3d at 1257; *see also Gilmore v. Gonzales*, 435 F.3d 1125 (9th Cir. 2006). The question of whether a DHS TRIP letter constituted a final order of TSA was not before the Ninth Circuit, a distinction noted by the court in *Scherfen*, the only other court to issue a decision on this issue. 2010 WL 456784, at *10 ("Significantly, *Ibrahim* did not involve a determination made by DHS following receipt of a Traveler Inquiry Form from the affected person. Thus, *Ibrahim* did not present for consideration the issue of whether a DHS TRIP determination letter constitutes an order falling within § 46110.").

In *Scherfen*, similar to the claim brought by Plaintiff in this case, an American citizen and his wife contended that they had not been afforded "'a legal mechanism that affords them notice and an opportunity to contest their inclusion on the terrorist watch lists.'" *Id*. at *1. The court found that the plaintiffs did not have standing to bring their claim because they had failed to demonstrate a "reasonable expectation that the alleged wrongful conduct [would] recur." *Id.* at *9.

The court also found that it lacked jurisdiction to hear plaintiffs' challenge under section 46110. In *Scherfen*, the court dismissed the case because "the existence of TRIP determination letters in this case means that, unlike *Ibrahim,* there are orders issued by an agency named with § 46110." *Id.* at *11. In addition, a DHS TRIP determination in this case means that a reviewing

court would have access to an administrative record to review. *See Scherfen*, 2010 WL 456784, at *7 ("One of the reasons that the majority in *Ibrahim* found that the placement of a person on the No Fly List fell outside the scope of § 46110 was the absence of any administrative record to review. Where, however, the TRIP process has been invoked, there is indeed a record for review by the appellate court.").

As explained above, after completing DHS TRIP, Plaintiff must include TSA in this lawsuit to obtain the relief he seeks. Once he has completed DHS TRIP, he will have a final order from TSA, and pursuant to *Ibrahim*, he can challenge that order in a Court of Appeals.

CONCLUSION

For the reasons stated above, and in the Government's prior filings on this issue, Plaintiff's Complaint must be dismissed, and judgment entered in Defendants' favor.

Dated: April 11, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following counsel of record:

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